UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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RETIREMENT BOARD OF THE POLICEMEN'S ANNUITY AND BENEFIT FUND OF THE CITY OF CHICAGO, on Behalf of Itself and Similarly Situated Certificate Holders,

Plaintiffs,

v. 11 CV 5459(WHP)

THE BANK OF NEW YORK MELLON (as Trustee Under Various Pooling and Servicing Agreements),

Defendant.

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December 6, 2013

12:30 p.m.

Before:

HON. WILLIAM H. PAULEY III,

District Judge

APPEARANCES

SCOTT & SCOTT
Attorneys for Plaintiffs
BY: WILLIAM C. FREDERICKS
MAX R. SCHWARTZ
BETH ANN KASWAN

MAYER BROWN LLP
Attorneys for Defendants
BY: MICHAEL MARTINEZ
MATTHEW D. INGBER

(Case called)

(In open court)

THE DEPUTY CLERK: Appearances for the plaintiff?

MR. FREDERICKS: William C. Fredericks, Scott & Scott, Attorneys of Law, LLP, for plaintiffs.

MR. SCHWARTZ: Max Schwartz, also for plaintiffs.

MS. KASWAN: Beth Kaswan, also for plaintiffs.

THE COURT: Good morning, or I should say good afternoon.

THE DEPUTY CLERK: Appearance for the defendant?

MR. MARTINEZ: Mike Martinez, Mayer Brown, on behalf of Bank of New York Mellon.

MR. INGBER: Good afternoon, your Honor. Matthew Ingber, also for the Bank of New York Mellon.

THE COURT: Good afternoon, gentlemen.

This is argument on Bank of New York Mellon's motion addressed to certain claims in the second amended complaint.

Do you want to be heard, Mr. Martinez?

MR. MARTINEZ: Yes, your Honor. Should I use the podium, your Honor?

THE COURT: Yes, that would be great.

MR. MARTINEZ: Your Honor, I'll be handling the first claim and Mr. Ingber will be handling the second claim. The first claim is the breach of the implied covenant claim.

So last July we had an argument in this courtroom

regarding whether to go forward with the Rule 30(b)(6) deposition with the Bank of New York Mellon. And at that time the plaintiffs wanted a deposition on their breach of the implied covenant claim that the Bank of New York Mellon, through the Delaware settlement agreement, agreed to have Bank of America assume $16.6 billion of Countrywide debt securities, and the Bank of New York Mellon agreed to work with Bank of America to strip Countrywide from any assets.

Now, the complaint further alleged that Bank of America's corporate consents showed that the Delaware settlement was the impetus of Bank of America's November 2008 asset stripping transactions.

Back in July I argued that plaintiffs were trying to prove an implausible theory akin to the world being flat. Since that time plaintiffs have taken a Rule 30(b)(6) deposition at the Bank of New York Mellon for seven hours, a Rule 30(b)(6) deposition at the Bank of America for seven hours, a Rule 30(b)(6) deposition of Carter Ledyard, one of the law firms representing the Bank of New York Mellon in the Delaware action, again, for seven hours. They've had a Rule 30(b)(1) deposition of Loretta Lundberg, who during the relevant time period was the head of US corporate finance for the Bank of New York Mellon. And it was on -- much of it was on the same topic.

What's the result been? There is no support for their

claim. The world is still round. And when we looked at plaintiffs' breach of the implied covenant claim, what we see is that it's facially implausible. It's undermined by the very documents on which the plaintiffs relied, the complaint and settlement agreement, the B of A corporate consents and B of A's SEC form 8K from November 7, 2008.

Let me go through just seven quick factual contradictions with the documents.

First, the Delaware complaint related to only $2 billion of Countrywide debt securities, not $16.6 billion.

Second, the settlement agreement made clear that the Bank of New York Mellon was acting solely in its capacity as indentured trustee for series B debentures with a face value of $2 billion, and not on behalf of other debenture holders.

THE COURT: But didn't the corporate consents for Countrywide require your client to approve the supplemental indentures?

MR. MARTINEZ: Absolutely, your Honor. I mean, part -- when you look at the indentures, the indentures required if there's a merger, or if another purchaser purchases substantially all the assets, that that successor now take the obligations, the corporate debt obligations of the prior party. And then the trustee's in the position of deciding to enter into that supplemental indenture or not.

But that is a separate transaction. That has nothing

to do with the Delaware litigation at all. The Delaware litigation was brought because these series B indentures -- and they were unique in this sense: This particular indenture provided for a change -- it had a change of control repurchase option of the other indentures, which the Bank of New York Mellon was also trustee and which were assumed by B of A didn't have a repurchase option upon the change of control.

So these series B debenture holders in July, after Countrywide was merged into a wholly-owned subsidiary Bank of America, they sued, and actually, they directed the Bank of New York Mellon as trustee to sue and enforce its repurchase right. And the repurchase right would have required Countrywide to repurchase the debentures at par at that time.

THE COURT: Doesn't the obligation to put back the mortgages touch on the issue of security interests in the collateral?

MR. MARTINEZ: Your Honor, a couple things on that point.

First of all, plaintiffs' complaint takes the position essentially that the Bank of New York Mellon as trustee for the MBS trusts shouldn't have brought or settled a Delaware lawsuit on behalf of series B debentures as trustee for them, but that ignores the law that the Bank of New York Mellon, as trustee, is a separate legal entity for each trust that they administer. So there's no uber trustee, where when the Bank of New York

Mellon's trustee for the series B indentures, it had an obligation to look within that particular indenture. It had an obligation in that sense to look inside the four corners of that agreement and not to look at all the other particular -- I mean, hundreds, if not thousands of other trusts for which the Bank of New York Mellon also happens to be a trustee. So even if there were an effect potentially -- and as we pointed out in our papers, you know, at this particular point in time in July of 2008, what the effect would be, you know, it would be a difficult one to know at that particular point in time.

So even if that were the case under the -- if you look at New York law, there is no implied right in that sense where this particular trustee would now have to consider all the other trusts for which it's trustee. I mean, the bank, New York Mellon, couldn't function as a trustee in that sense.

THE COURT: All right. Anything else?

MR. MARTINEZ: I don't know if we're going to touch upon discovery at this point. I know that was also on, but I can come back at the end, if you want to discuss discovery.

THE COURT: The request seems rather noncontroversial, doesn't it, to extend discovery by a month roughly? Isn't that what's requested?

MR. MARTINEZ: That is what's requested, your Honor, but I would point out we're now at the fourth discovery request. And the plaintiffs have made certain choices here. I

mean, frankly, they have chosen to pursue an implausible theory and forego other discovery options. As an example, in November they had a seven-hour deposition, a Rule 30(b)(6) on this particular implied breach theory of Bank of America. Now, they can use those seven hours, at least part of those seven hours, to lay the foundation for documents. But instead, they chose not to. And now, Bank of New York Mellon is really being forced to suffer the consequences of the choices that they made, not to lay foundation for document admission.

So, our position is still that we think there comes a point in time -- we're now at the fourth request -- that it's becoming burdensome for the Bank of New York Mellon.

THE COURT: All right. Let me hear from Mr. Ingber.

MR. INGBER: Thank you, your Honor.

THE COURT: And, Mr. Martinez, I mean, the plaintiffs do say that BoNY Mellon produced two 30(b)(6) witnesses who weren't particularly prepared to answer questions, don't they?

MR. MARTINEZ: We produced one. After somewhere between 12 to 17 minutes of questioning, they decided to terminate the first deposition.

And we came back with a 30(b)(6) witness, Jerry Facendola, at this time was the head of the default administration group. So he not only had personal knowledge, having supervised Martin Feig with respect to the Delaware litigation, but spent more than two days going over distilled

information that we had to come up with to refresh his recollection. He was more than adequately prepared on three topics, one topic which they didn't even question him on after we prepared him for. So he was more than adequately prepared. So the notion that Mr. Facendola wasn't prepared is absurd.

THE COURT: All right.

MR. MARTINEZ: And I think what's happened, your Honor, if I can add, is they've gone to the Bank of New York Mellon. They've gone to Bank of America. They went to Bank of New York Mellon's lawyer, law firm Carter Ledyard. They now have 21 hours of deposition testimony, and they can't support their theory. It's not that these witnesses were insufficiently prepared. It's that they have an inadequate theory. They could keep coming back, but you can't change -- I go back to what I said in July. If the world is still round, you can keep trying to say that it's flat, it's flat, it's flat, but all the data comes back saying it isn't.

MR. INGBER: Good afternoon, your Honor. May it please the Court.

The second piece of our motion to dismiss focuses on the question of whether the plaintiffs have adequately alleged claims as relating to the Delaware statutory trust, and specifically, whether the plaintiffs have adequately alleged that an issuer event of default has occurred.

And as background, as your Honor knows, there is one

trust in this case that is subject to a trust indenture. Depending on how the TIA issue plays out at the Second Circuit, there may well be one trust and only one trust that is subject to the Trust Indenture Act. And the claims that relate to this single trust really, like the claims that relate to all the trusts, are premised on the notion that there is an event of default or there was an event of default.

But for this indentured trust, unlike the PSA government trusts, there has to be an issuer event of default, and the issue with respect to this complaint is really three-fold. Number one, does it allege an issuer event of default? On the face of the complaint, is there an allegation of an issuer event of default?

THE COURT: Haven't I already ruled on whether the plaintiffs allege an event of default under the Delaware trust indenture?

MR. INGBER: You have, your Honor. And that's why actually the focus of my argument today is going to be on the second point and the third point.

The second point is whether -- is the merits point, is the substantive issue: Can there be an allegation that there is an issuer event of default? So if we read, as your Honor has, if we read the complaint as alleging generally that there's events of default, they didn't identify the issuer or referred it to provisions of the indenture, even though they've

alleged a breach of contract, they haven't actually alleged the provisions of the contract that are breached.

But putting that aside, there is this second question of -- really it's a merits question. Their theory is that there is a duty on the part of the issuer to enforce repurchase obligations of Countrywide or to ensure that the master servicer is enforcing repurchase rights of Countrywide. And so the substantive question, which was not briefed by the parties, is whether there is such a duty in the indenture.

And then the other question that we've raised on this motion to dismiss is whether -- even if they have alleged an event of default, and even if they could substantively allege an event of default, have they alleged that the trustee received notice of the event of default? And that means written notice or actual knowledge of an issuer event of default. And we think they fail on all three of these issues, but your Honor has already ruled on the first. And so we're going to focus, if we may, on the second, on the merits piece and then the notice piece today. And that's what we focused on in the brief, and that's what I'd like to focus on for the argument.

And so again, your Honor, the question is whether the issuer has a duty to enforce repurchase remedies or to make sure the master servicer is enforcing these repurchase remedies against Countrywide. And we think that that's just not the

case for two reasons. One is a practical reason, and the other is a contractual reason.

And starting with the practical, what is the issuer? The issuer is a statutory trust. It's a Delaware statutory trust. It has no employees. It has no officers. It has no directors. There's no one at the issuer reading the newspapers, as the plaintiffs say should have been done, to get constructive knowledge of an event of default. There's no reading complaints that have been filed or monitoring the master servicer. The issuer has no assets of its own. It gets principal and interest on the underlying loans, and those are paid out to investors in the securitization trusts. It uses an administrator to carry out its ministerial functions. The pro subs for these trusts say that the administrator can only carry out ministerial functions. The administrator is paid $200 a month to carry out these ministerial functions.

As far as we can tell, the issuer has no mechanism for tapping trust funds to fund a litigation that the plaintiffs think the issuer should have filed to enforce repurchase remedies. So there's no money to even pursue these types of claims that the plaintiffs think should have been pursued.

And then there's just the question of what the issuer does. The issuer is there to grant the security interest in the mortgage loans, to take steps to make sure that there is a perfected first priority security interest in the collateral

and there's a grant to the indenture trustee. That's what the issuer does.

THE COURT: But is it your argument that the issuer can never breach obligations because the issuer has no staff?

MR. INGBER: No, no, no. No. It's not. The issuer certainly -- there are events of default. If the issuer issues certain obligations, the issuer has to pay out the principal and interest on these loans. That's what is required by these documents. It's what's contemplated when investors purchase these notes that the issuer -- if the issuer doesn't make those payments, even if it uses an administrator or some other party to effectuate that duty, then that could be a breach by the issuer.

So, of course, the contracts contemplate that the issuer could be in breach, but they certainly -- and this is a good segue to the next point. They certainly don't contemplate that the issuer is accepting the duty to enforce repurchase remedies. So the practical point that I'm making is contextual. It gives context to a reading of the contracts that we believe makes the most sense.

And, your Honor, if I may, I know these are exhibits to our motion. Can I hand up just a few provisions of the indenture that we believe are relevant to this issue?

THE COURT: All right. But, look, I've been through your briefs. I'm not going to --

MR. INGBER: That's fine.

THE COURT: -- spend a lot of time walking through these provisions.

MR. INGBER: That's fine, your Honor. So I certainly won't do that, then. I'll keep it brief.

THE COURT: I mean, if the indenture trustee doesn't have a duty to enforce, who has the duty?

MR. INGBER: The certificate holders have the ability to direct the indenture trustee to take action. That's what is most fundamental in these agreements. These certificate holders, when they purchase their certificates, or in this case when they purchase their notes, they can read the indenture trust. They can read the sale and servicing agreement and the trust agreement and the administrator agreement. They know what the duties of each of the relevant parties is.

And they also understand that there is a mechanism for getting 25 percent of certificate holders or note holders together to direct the trustee. Even if they're not themselves a 25 percent holder, they could, with two other -- at least some of these trusts, with two other certificate holders, they could request a list of certificate holders. They could take steps to get 25 percent to direct the trustee. That's what these contemplate. They also contemplate and make --

THE COURT: That's not a duty. That's a right that they have. Who has the duty?

MR. INGBER: The trustee has a right also. There is an important distinction between a right, obviously, and a duty. The trustee has the right to pursue these claims, but it doesn't have the duty.

THE COURT: Who has the duty?

MR. INGBER: Well, certainly the master servicer has -- well, with respect to the question of whether there is a party to the contract that has the duty to monitor the seller, in this case Countrywide, to determine whether there are breaches of representations and warranties, the only candidate of the parties to this agreement would be either the seller itself or -- there would be self policing or it would be the master servicer. But it is certainly not --

THE COURT: But the master servicer is the other party to the agreement.

MR. INGBER: And, therefore, the master servicer has the right, and arguably the obligation, to pursue claims for breaches of representations and warranties, if they know, if they are aware of actual breaches of representations and warranties with respect to individual loans in these trusts.

THE COURT: Well, who represents the issuer's interest?

MR. INGBER: There is an owner trustee that by statute has to be appointed. Under Delaware statute, the way these trusts are set up, if the trust is the issuer, there an owner

trustee that is appointed as the trustee of the trust, a trustee of the issuer.

THE COURT: All right. What else?

MR. INGBER: So the focus of our briefing, your Honor, was on Section 305 of the indenture. And that was a provision of the indenture that your Honor actually had cited to in one of the orders. That wasn't briefed by the parties. Your Honor did cite to that, and that has since become the focus of the briefing. What is --

THE COURT: What types of rights does Section 305(a)(4) refer to?

MR. INGBER: It refers to the right to title in the collateral, the right to ownership in the collateral. If you consider the context -- but even if you just consider that provision, it's not rights relating to, it's rights -- it's what are the issuer's rights? The issuer's rights are to title and ownership of the collateral. And it's important that the issuer have those rights, because the issuer is granting a security interest to the indentured trustee.

If you read what comes before and what comes after, and you read the preamble of 305, this is all relating to the issuer's security interest. 305(a) starts by saying that the issuer intends the security interest granted under this indenture to be before all other liens on collateral.

THE COURT: How is that any different, though, than

305(a)(5) that says you preserve and defend title?

MR. INGBER: Well, I think all of these in some respects are overlapping. The way we read 305, and I think it's the logical way to read it, especially in light of what the issuer's role is and is certainly understood to be in the industry, is that 305.4 is a catchall.

So the whole point of 305(a) and (b), if you read the preamble and you read one through three and you read five and six, the whole point is what does the issuer need to do to make sure that it has a perfected security interest that it could grant to the indentured trustee?

So one says grant more effectively any portion of the collateral; two refers to preserving the security interest; three, perfecting the validity of any grant; four is to defend title against adverse claims.

Are there any adverse claims here? There's no adverse claims to the title. There's been no allegation of that.

Five refers -- I'm sorry, six refers to taxes. What the plaintiffs have said is that, of course, this refers to enforcing breaches of reps and warranties, and in their briefs that's what they said. Read the language. The language says, according to the plaintiffs, that it's related to breaches of reps and warranties. It's not related to breaches of reps or warranties because it doesn't say it. And the drafters of these types of documents understood how to be specific about

what they meant.

THE COURT: But doesn't putting back mortgages go to rights in the title to the collateral?

MR. INGBER: No, because we're talking about the issuer's right to title. And putting back mortgages has nothing to do with title. Title is conveyed by contract. Title is conveyed through these contracts. That is how title is conveyed to the issuer. And the issuer just has to make sure that somebody else out there isn't going to claim title to this collateral. That's why the issuer exists. That is the role, the responsibility, the duty of the issuer.

Breaches of reps and warranties, your Honor, has nothing to do with that question of whether the issuer has title. The title is conveyed through the contract. There is conveyance language in these documents. The issuer then has to make sure that once that title is conveyed by in this case the depositor to the issuer, that it -- no one is making claims against that title. No one can say to the indentured trustee or to the issuer or anyone else, we have superior title. So that's what this entire section -- which says, protection of the collateral, that's the title of 305. That's what it relates to.

And I was saying before, your Honor, the drafters, we believe if they intended to have this expansive duty for the issuer, they would say so. The PSA -- and I understand we're

not talking about PSAs; we're talking about indentures here. But the PSAs are, we think, important to keep in mind, because they, in Section 201 of the PSAs, they convey -- and they're different than the indentures. But they, the depositor is conveying to the trustee in that case whatever rights the depositor has. And what that language says is that the depositor assigns all the right, title and interest of the depositor in the trust fund, together with the depositor's right to require each seller to cure any breach of a representation or warranty made herein.

Now, that is a right that's being conveyed, not a duty, but the drafters were specific. What the plaintiffs are seeking to impose on the issuer is an incredibly expansive duty under any circumstances that would be an expansive duty, especially under the circumstances where we have an issuer with very defined and very ministerial functions. That's the type of duty that the drafters would actually, we believe, would actually write out in this agreement, if it was intended to -- if that language, 305.4, was intended to impose this type of duty.

There's also the notice issue, your Honor. And I'll just mention this very briefly, because I know we have limited time and we've briefed it in the papers. But this is not an insignificant issue. This is not a hyper technical issue.

Section 601(c)(4) of the indenture says that the

indentured trustee doesn't have notice of an event of default unless a responsible officer of the indentured trustee either has actual knowledge -- not constructive knowledge, actual knowledge -- or notice of the event of default. And we're talking here about an issuer event of default.

1104 of the indenture defines notice as written notice delivered in a certain way. There's no allegation -- we don't believe there's any allegation in the complaint, nor could there be, that there was notice or actual knowledge of an issuer event of default. And so we believe, your Honor, that this is another ground or another basis for dismissing the claims relating to the Delaware statutory trust.

THE COURT: All right. Let me hear from the plaintiff.

MR. INGBER: Thank you, your Honor.

THE COURT: Thank you, Mr. Ingber.

MR. FREDERICKS: Your Honor, do you have a preference for me addressing the indentured trust issue first or the implied claim first? I'm happy to go in any order the Court prefers.

THE COURT: Well, assuming that Bank of New York Mellon facilitated the transaction between Bank of America and Countrywide and settled the Delaware lawsuit, how did those actions directly cause plaintiffs' losses?

MR. FREDERICKS: Your Honor, they impaired plaintiffs'

ability in -- to collect against a solvent or more solvent Countrywide, because Bank of New York was essentially wearing more hats than it had any business wearing here. It was both trustee on the commercial notes; most of them, admittedly not all. It represented as trustee the MBS trusts, and itself was a creditor of Countrywide, something we've only recently learned in discovery, under the line of credit debt that was paid off as part of the July transactions.

And then Bank of New York Mellon, despite being a recipient of payments on debt owed to itself by Countrywide, despite being the trustee for the MBS trusts who had tens of billions of dollars contingent repurchase claims against the trust, then proceeds to act on behalf of at least one specific group of commercial note holders, the series B trust holders, in order to get, once again, that group of preferred creditors paid off essentially in full. I mean, it was 98 cents on the dollar, but effectively they got paid off basically in full. That's $2 billion in the context of an entity which is insolvent. I think it's very telling, your Honor, that defendants nowhere deny that the complaint more than adequately alleges the insolvency of the Countrywide entities.

Now, they come into court today and make what I think is an extraordinary argument, which is, oh, in each of our capacities, we're a separate legal entity. And the fact that we're facilitating the payout of an insolvent entity's assets

into the pockets of one of our beneficiaries, we can completely turn a blind eye to the fact that in so doing, we are clearly impairing the ability of our other trust beneficiaries, the MBS note holders, to get anything. And our theory, our fundamental damages theory, is that had events proceeded as they should have -- Countrywide was insolvent. Bank of New York Mellon's own allegations in the series B litigation show that they were insolvent, allege concerns about Countrywide's precarious financial condition. They write to the chancellor of the Delaware Chancery Court to say, we have a repurchase right to these series B notes, which comes due in May 2009. But Countrywide, you know, from what we've read in the SEC filings and elsewhere, Countrywide isn't going to make it to May 2009 because it doesn't have the money.

So on one hand, they're going to a judicial officer, the Delaware chancellor, saying, pay us the money on the series B, $2 billion. That's not necessarily chump change. And the important thing here, your Honor, is that the series B action itself is only a part of the puzzle when we initially put together this plea, that it was back in May of 2008. And obviously we're still learning more. Based on the public documents we saw at the time, we thought there was a reasonable connection between what was going on with the series B litigation and the assumption of debt on all the other commercial notes.

THE COURT: How is there an implied promise that BoNY Mellon wouldn't settle other lawsuits?

MR. FREDERICKS: Your Honor, this goes to two alternate prongs or two arrows in our quiver. The first is the standard breach of duty of good faith and fair dealing language under New York law, which says that a party cannot do anything to impair its counterparty's ability to reap fruits of its contract. If you and I have a contract that gives me an interest in a particular business or a security interest, a particular business, we may not have any specific contractual provision that says you can't then go and damage the business in which I now have an investment. But New York courts every time will apply a duty that you can't harm my security interest that is a subject of our contract. You just can't do it, because here, what could be more posh to the MBS trust holders than making sure that the collateral that they have, that underlies their securities, is, in fact, protected, not impaired, and that there is going to be recourse at the end of the day if there is an impairment, because who pays? Who pays is Countrywide.

And what happened here, Bank of New York Mellon is collecting millions of dollars, hundreds of millions of dollars we think on line of credit debt owed from Countrywide. It's acting on behalf of the series B note holders to collect money for them from Countrywide. It precipitates a situation where

other commercial note holders at exactly the same time that the series B litigation is being concluded, those folks are being paid off.

And, your Honor, I would like to show you one document from -- that we gained in discovery just from the very last deposition we took, which I think it goes very much to this.

THE COURT: But Countrywide's available assets aren't the security, right?

MR. FREDERICKS: Your Honor, Countrywide's available assets are what the backup is for the collateral. I mean, I may have title to a security. I may have a security interest in a particular investment. But if I can't ultimately recoup any value on what is basically the building blocks of the securities we're talking about, I mean, that is every bit as important as what the title is.

But, your Honor, if I may, this is the Gadson Exhibit 19. This was a document -- we had a little colloquy --

THE COURT: All right. This is a motion to dismiss. Both sides want to hand up all kinds of things.

MR. FREDERICKS: Your Honor, I hand up this one for a particular reason, because Bank of New York Mellon wants the Court to believe that all the transactions that occurred in July and in November and in between were all part of the ordinary course of business. And if they had all been in the ordinary course of business, we would not be here. If these

were just indentures being signed by, you know, Warren Buffett and Berkshire Hathaway, an entity whose credit rating is probably greater than the US government, we wouldn't be here.

We have been trying to get through discovery documents showing Bank of New York Mellon's knowledge of Countrywide's insolvency. We took 30(b)(6)s. They said we don't know what you're talking about. Why would we be monitoring? Why would we have any notice of insolvency? We asked for documents relating to insolvency and bankruptcy. We don't have any such documents. It's frivolous for us to even be looking for them. Why would we be worried about Countrywide solvency? Probably because I guess they have this theory that, you know, they all live in separate cones. Each trustee is separate.

We finally take, after a failed 30(b)(6) deposition, a deposition of Bank of New York Mellon's attorneys. And the document that I've shown you, your Honor, is a letter that was copied to Bank of New York Mellon in September 2008, literally about -- this is after the series B litigation has been brought and less than a month before the series B litigation is settled, where Kasowitz Benson writes on behalf of one group of series B note holders to Countrywide. If you look at the first page, the second paragraph, Aurelius believes that CHL is insolvent; indeed, deeply so. Goes on to list five or six bullet points of evidence as to why they believe Countrywide is insolvent, puts them on notice that they believe that

fraudulent conveyances are going on because 5.5 billion of CHL assets are being carved through Countrywide Bank because, as we're learning in discovery, Countrywide bank was undercapitalized. Points out that there are highly material conflicts between the interest of CHL and its various creditors. This is them writing to Countrywide, but it's all copied to Bank of New York, and basically says there should be an independent committee of the board of directors appointed CHL to ensure that Countrywide's interests, the interests of creditors, are not being impaired.

This is not business as usual. This letter -- which it's remarkable that, of course, the Countrywide Bank of America never produced it in any of their prior litigations -- it's remarkable that Bank of New York Mellon never produced it to us. It's remarkable that we had to go subpoena their outside counsel lawyers, and that lawyer was honest enough to have not deep-sixed this kind of document. Bank of New York Mellon knows that Countrywide is insolvent.

And I don't think I need to tell your Honor that when you have an insolvency situation, you have to line up the rights of creditors of the United States Constitution. Last time I looked, there's a supremacy provision that Congress has the right to preempt all bankruptcy matters. It's done so in the federal bankruptcy code. That provides for how assets of an insolvent entity are meant to be distributed.

And here, Bank of New York Mellon, it was playing favorites. It was playing favorites for itself to get paid. And it cannot have been -- it could have resigned. It could have stepped away. But the case law is clear that, you know, under your Honor's own decision in *L.F. Rothschild*, where you cite Learned Hand, the trustee has, even absent a contract, a duty of scrupulous loyalty.

What kind of loyalty was the APS trust getting here? It wasn't getting anything. Everyone else got paid effectively. All of Countrywide's creditors got paid effectively, most of it through the help of Bank of New York's involvement in this process. Defendant's own brief says that the November indentures and the November transactions, which were the final piece of the asset stripping transactions, couldn't have gone down without Bank of New York Mellon's own involvement.

And the term asset stripping, that's not a term that we've invented, your Honor. Asset stripping is a term that Bank of New York Mellon itself used in describing what was going on to the Delaware Chancery Court. And the pretend observation, well, it's just the series B. If it had only been the series B, it would still be $2 billion additional of assets, but it was a much broader construct. It was the whole transaction. And Bank of New York Mellon was wearing way too many hats here. It was then paid itself, it was getting

payoffs for some of its clients. And what was it doing for the MBS trust holders? Nothing.

THE COURT: All right. I think I have your arguments. Anything further?

MR. FREDERICKS: I'm happy to address the indenture trust argument, but I think again, your Honor, you decided it right the first time. You decided it right the second time.

And if your Honor looked, I do want to correct one misstatement in the record on reconsideration. The 305 issue was raised in our reply brief on the initial motion to dismiss. The specific provisions of 305(a)(4) and (5) were specifically mentioned in the oral argument on the initial motions to dismiss. Your Honor got the 305 issue correct then. It got it correct on reconsideration. This is in effect a third bite at the apple. Your Honor has got it exactly right.

The one thing that I would just ask your Honor to look at is this notion that there is no provision in the contracts or the indenture that imposes or implies any issuing rights outside of 305(a)(4), or 305(a)(4) is incorrect. We have cited in our brief additional provisions in the indenture which refer specifically to the issuer rights obligations, including in particular paragraph 518 of the indenture, which says that the indentured trustee as pledging the mortgage loans may exercise all rights of the issuer against the sponsored or master servicer in connection with the SSA, including the right to

take any action to obtain performance by Countrywide as either seller or master servicer; that admittedly all refers to the indentured trustee. But if you read Section 518 to the end, it goes on to say, and any right of the issuer to take such action shall not be suspended.

There's also provisions in 308J which talk about issuer rights. Your Honor put your finger exactly on it. There are issuer duties. If the issuer did not sufficiently retain an administrator to police these matters, to take appropriate action, that's the issuer's problem. And in fact, if there is anyone out there to enforce them, it makes it all more important that the indentured trustee is there to monitor what has occurred.

I think that defendants have no response to the argument that they appoint -- that the issuer appoints an administrator to perform issuer responsibilities. I mean, there's this weird dichotomy. They say the issuer is powerless to do anything, but then they point to a whole bunch of other things that the administrator does.

And so here, in essence, the structure is exactly the same or indistinguishable from what it is under the PSA. You have Countrywide as administrator. Countrywide's master servicer. They're the people who are meant to deal with it, who have these obligations, although in this case the administrator is acting in a sense as the agent of the issuer.

So there are eyes and ears out there to do this.

I would like to just quickly address the notice.

THE COURT: No, because -- no. I asked you to wind up a few minutes ago, and you're going through stuff that's just all in the briefs. Spare me. I've got a whole bunch of other matters on this afternoon. I've got your argument.

Is there anything further from the defendants?

MR. MARTINEZ: Your Honor, just one thing.

In our argument on the implied breach, we stayed focused on what is a question of under a motion to dismiss. If your Honor would like to hear this Kasowitz Benson letter regarding series B litigation, it's not part of their complaint. They're now adding new allegations and new documents.

If I could just say one thing. In this series B, this same Kasowitz Benson firm that represented Aurelius came forward and said there is an event of default and, therefore, the Bank of New York Mellon, as trustee for the series B indenture holders, had a block payment to junior debenture holders, and that ultimately led to the Bank of New York Mellon as trustee resigning before the indentured trusts that were at issue here.

Your Honor, I don't want to go into it because it's irrelevant for this particular inquiry, but this just goes back to my discovery point from before. It seems that each time we

point out to them your claim is fundamentally flawed because it's contradicted by the documents which you rely, they then try to come up with a new theory that we keep chasing our tail on this.

THE COURT: All right.

MR. FREDERICKS: I have one new matter, your Honor. Obviously it's hard to plead the contents of a document that you only get two weeks ago.

On the discovery schedule, we put in the request to two weeks ago. It was also before we received defendant's most recent privilege log, which we got on the last day of discovery, which was enormously voluminous. We are making --

THE COURT: How voluminous is it?

MS. KASWAN: There are thousands of entries on it, your Honor. And we have been wading through it, and some of the documents have been redacted so --

THE COURT: Wade through it. I am granting the discovery request extension. Now you want to modify it?

MR. FREDERICKS: We put in the request on the assumption or in the hope that it might be granted quickly. To the extent we have two third-party deponents, it's probably going to be hard to get their documents, review them, schedule their depositions by December 30. Our hope was that if we had an extension until January 15th, and then we would submit a letter to your Honor.

THE COURT: Granted. Granted.

MR. FREDERICKS: Thank you, your Honor.

THE COURT: Finally, I'm going to issue an order to afford Bank of America an opportunity to explain to me why that redacted paragraph should be redacted, because otherwise I don't believe that it should be. But I'll give Bank of America until sometime next week, depending if I can get the order out today.

MR. FREDERICKS: Thank you, your Honor.

THE COURT: Thank you for your arguments. Have a good holiday everyone.

(Adjourned)